FILED
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No. 97-1286

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

In Re: Joseph Smith & Sons, Inc.

Debtor.

FRED G. ZEHNER,

Petitioner,

V.

ROBERT PAUL SMITH, ET AL

Respondents,

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED

I. SPECIAL CASE & STRICT LIABILITY

The proceedings in this matter have so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the lower court, as to call for an exercise of this Court's supervisory power. All parties involved are in the business of recycling and shipping/disposal of dangerous, toxic and hazardous materials. Because this handling of toxic hazardous waste is involved, strict liability is an issue where utmost care is required because of the great risk to the public.

II. ABUSE OF PROCESS

A. Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the facts material to resolution of this appeal are not in dispute?

B. Did the U.S. Court of Appeals for the Fourth Circuit err in its determination that the Appellant failed to meet his burden of proof supporting his claim as to abuse of process?

III. DENIAL OF DUE PROCESS

A. Did the Judge err in his determination to conclude the bankruptcy hearing prior to allowing the testimony of all witnesses and experts present as indicated by counsel would be called at such hearing, thereby denying Appellant due process?

B. Was the appellant denied due process by the fact that: (i) he has been and continues to be denied a copy of the tape of the bankruptcy hearing, even though the Fourth Circuit made their hearing tapes available

immediately without question, yet bankruptcy court continues to refuse tapes, and (ii) that the court record has been altered in a major way?

C. Was the appellant denied due process by the fact that he lost his jury trial because of Smith and his attorney's clear perjury to the trial court to delay this case until Smith found a vehicle to evade the set jury trial?

IV. PERJURY/FRAUD UPON THE COURT

A. Did the Judge err when he referred to Appellant's lack of pursuit of discovery sanctions remedies at the lower court level, when the record clearly reflects such remedies were in fact pursued by Appellant?

B. Did the trial Court err in its determination to deny appellant's request for discovery sanctions for Appellee's refusal to cooperate with discovery based upon Appellee's perjury and fraud upon the court by falsely indicating that the all important non-existing documents had been provided by Appellant?

V. UNCLEAN HANDS

A. Did the court err in its decision in not finding against the Appellee based upon the doctrine of unclean hands, in that there was fraud in the possession of Smith's main witness false manufactured evidence dated 47 days before the lawsuit was filed and that Appellee was dismissed from a mutual business association for attempting to involve Appellant Zehner in a mutually benefici[illegible]' and illegal enterprise?

PARTIES TO THE PROCEEDING

Fred G. Zehner
1990 Holland Cliff Road
Huntingtown, MD 20639
Petitioner/Appellant/Creditor

Robert Paul Smith
2001 Kenilworth Avenue
Beaver Heights, MD 20743
Respondent/Appellee/Debtor

Joseph Smith & Sons, Inc.
2001 Kenilworth Avenue
Beaver Heights, MD 20743
Respondent/Appellee/Debtor
no parent compny or nonwholly owned subsidiaries

Richard R. Page Wyrough, Esquire, is the attorney for Robert Paul Smith and Joseph Smith & Sons, Inc.. Claude B. Shaffer was a party in interest. Respondents contend that these two parties are incorrectly listed by Petitioner as parties to the proceedings.

Contaminated Soil Consultants, Inc., a party to the proceedings below, has filed a separate Petition for Writ of Certiorari received by the Office of the Clerk on December 16, 1997, which was returned on February 2, 1998, for failure to comply with the Court's Rules of Procedure. Respondents contend that this party is incorrectly listed by Petitioner as a party to the proceeding.

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TABLES OF AUTHORITIES

CASES:

One Thousand Fleet Limited Partnership v. Guerriero,
346 Md. 29, 38, 694 A.2d 952 (1997) 4

STATUTES AND RULES:

28 U.S.C. §1254(1) 1

SUP. CT. R. 10 3, 4

OPINIONS BELOW

The opinion of the court of appeals is unreported, as are the opinions of the district court and the bankruptcy court.

JURISDICTION

The order of the court of appeals, which affirmed the district court, was entered on August 5, 1997. The court of appeals denied petitioner's petition for rehearing on September 17, 1997. The jurisdiction of this Court is invoked under 28 § U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents submit that Petitioner's Petition for Writ of Certiorari does not relate to any statutory provisions. The opinions below dealt with Bankruptcy provisions but Petitioner has not raised any issues pertaining to those provisions.

STATEMENT OF THE CASE

Respondents adopt and incorporate herein as if restated in full the statement of facts from the opinion of the United States Court of Appeals for the Fourth Circuit.

ARGUMENT AND REASONS FOR DENYING THE WRIT

I. "Special Case & Strict Liability"

Respondents discern no cognizable appellate issue presented by Petitioner in this "argument". At no time prior to the Petition for Writ of Certiorari has the issue of "strict liability" been raised and Respondents object to it being raised now. The court of appeals and district court have affirmed the decision of the bankruptcy court dismissing Petitioner's Proof of Claim for failure to establish a cause of action for abuse of process. Respondents submit that the proceedings have not departed from the accepted and usual course of judicial proceedings.

II. Abuse of Process

A. *The court of appeals properly determined that the facts material to resolution of this appeal are not in dispute.*

Petitioner argues that the lower court made an error in its factual finding. Petitioner cites items which are not part of the record on appeal in support of his contention that the facts of the case are in dispute. Petitioner's "argument" is that the complaint filed by Respondent lacked merit. The lower court did not make any ruling on whether or not the complaint lacked merit. Furthermore, whether or not the complaint lacked merit is not an element of abuse of process. The lower court, in its factual findings, simply summarized the allegations contained in the complaint. Even if the lower court erred in its determination that the facts material to resolution were not in dispute, Respondents submit that the Petition for Writ of Certiorari should not be granted because the asserted error consists merely of an allegation of erroneous factual findings. SUP. CT. R. 10.

B. *The court of appeals properly determined that the Appellant failed to meet his burden of proof supporting his claim as to abuse of process.*

The court of appeals properly determined that the Appellant failed to meet his burden of proof supporting his claim as to abuse of process. The court properly articulated the elements of abuse of process under Maryland law: (1) willful use of civil process on the part of the defendant after the process has issued in a manner not contemplated by law, (2) an ulterior motive and (3) damages resulting from the defendant's abuse of process in the form of arrest of the person or seizure of property of the plaintiff. The elements are set forth in the recent case of One Thousand Fleet Limited Partnership v. Guerriero, 346 Md. 29, 38, 694 A.2d 952 (1997). The court properly determined that Petitioner had failed to meet the third element. Even if the court had misapplied the law on abuse of process, Respondents submit that the Petition for Writ of Certiorari should not be granted because the asserted error consists of the misapplication of a properly stated rule of law. SUP. CT. R. 10.

"III. DENIAL OF DUE PROCESS"

"A. *Did the Judge err in his determination to conclude the bankruptcy hearing prior to allowing the testimony of all witnesses and experts present as indicated by counsel would be called at such hearing, thereby denying Appellant due process?"*

Respondents contest the accuracy of the factual basis for this alleged error. Nonetheless, Petitioner did not object at the hearing before the bankruptcy Court. Thus, even if this was a potential factual issue, the issue was not preserved below and may not be raised before this Court.

"B. *Was the appellant denied due process by the fact that: (i) he has been and continues to be denied a copy of the tape of the bankruptcy hearing, even though the Fourth Circuit made their hearing tapes available immediately without question, yet bankruptcy court continues to refuse tapes, and (ii) that the court record has been altered in a major way?"*

Respondents contest the accuracy of the factual basis for this alleged error. Nonetheless, Petitioner did not object at the hearing before the United States Court of Appeals for the Fourth Circuit. Thus, even if this was a potential factual issue, the issue was not preserved below and may not be raised before this Court.

"C. *Was the appellant denied due process by the fact that he lost his jury trial because of Smith and his attorney's clear perjury to the trial court to delay this case until Smith found a vehicle to evade the set jury trial?"*

Respondents contest the accuracy of the factual basis for this alleged error. Nonetheless, Petitioner did not object at the hearing before the bankruptcy court. Thus, even if this was a potential factual issue, the issue was not preserved below and may not be raised before this Court. Furthermore, at no time prior to the Petition for Writ of Certiorari has the issue of the right to a jury trial been raised and Respondent objects to it being raised now.

"IV. PERJURY/FRAUD UPON THE COURT"

"A. *Did the Judge err when he referred to Appellant's lack of pursuit of discovery sanctions remedies at the lower court level, when the record clearly reflects such remedies were in fact pursued by Appellant?"*

Respondents contests the accuracy of the factual basis for this alleged error. The record reflects that the Motion for Sanctions was denied. Furthermore, Petitioner did not object at the hearing before the bankruptcy court. Thus, the issue

was not preserved below and may not be raised before this Court.

> "B. *Did the trial Court err in its determination to deny Appellant's request for discovery sanctions for Appellee's refusal to cooperate with discovery based upon Appellee's perjury and fraud upon the court by falsely indicating that the all important non-existing documents had been provided by Appellant*?"

Respondents contest the accuracy of the factual basis for this alleged error. Petitioner failed to raise this objection below. Thus, even if this was a potential factual issue, the issue was not preserved below and may not be raised before this Court.

> "V. UNCLEAN HANDS"
>
> "A. *Did the court err in its decision in not finding against the Appellee based upon the doctrine of unclean hands, in that there was fraud in the possession of Smith's main witness false manufactured evidence dated 47 days before the lawsuit was filed and that Appellee was dismissed from a mutual business association for attempting to involve Appellant Zehner in a mutually beneficial and illegal enterprise*?"

Respondents contest the accuracy of the factual basis for this alleged error. Furthermore, the objection was not raised

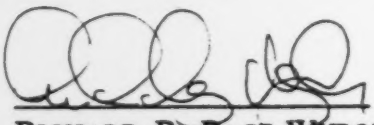
below. Thus, even if this was a potential issue, the issue was not preserved below and may not be raised before this Court.

CONCLUSION

For the reasons set forth above, there are no substantial issues which warrant review by this Court. Respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

CAIN & WYROUGH



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